IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 139 of 1993

For Approval and Signature:

THE HON'BLE MR.JUSTICE D.A.MEHTA
MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgement ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgement ?
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Petitioner(s)

Versus

GARDEN SILK WEAVING FACTORY - Respondent(s)

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Appearance :

MR TANVISH U BHATT for Petitioner No(s).: 1.
MR JP SHAH for Respondent No(s).: 1.

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CORAM :THE HON'BLE MR.JUSTICE D.A.MEHTA
MS.JUSTICE H.N.DEVANI

Date : 15/06/2005

ORAL JUDGMENT

(Per : THE HON'BLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'B' has referred the following question for the opinion of this Court under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

> "*Whether, the Appellate Tribunal was right in law and on facts in holding that what was sold by the assessee firm to the limited company was its running business, as a going concern together with all the assets and liabilities and the provisions of Sec.41(2) of the Act cannot be invoked under the facts and circumstances of the asseeee's case ?*"

2 The Assessment Year is 1973-74 and the relevant accounting period is calendar year 1972. The assessee, a registered firm, entered into an

agreement with a Private Limited Company known as Garden Silk Mills Private Limited. The agreement dated 1/12/1971 recorded that the assessee was to transfer the business of the firm, run in the firm name and style of Garden Silk Weaving Factory, as a going concern together with all the assets and liabilities. The agreement was followed by necessary accounting entries made on 1/1/1972 showing the amount of consideration received from the Private Limited Company at Rs.15,15,000/- received for transfer of the running business with all assets and liabilities. On 17/8/1973 the assessee firm executed a conveyance deed in respect of the immovable property.

3.(a) The Income Tax Officer framed an assessment order on 15/3/1976 computing profit under section 41(2) of the Act at Rs.10,25,135/-.

(b) The assessee carried the matter in appeal before the Appellate Assistant Commissioner who

set aside the assessment by order dated 18/7/1977.

(c) The assessee preferred Second Appeal before the Income Tax Appellate Tribunal. The Tribunal by order dated 9/1/1979 restored the matter to the file of the AAC after setting aside the order passed by the AAC on 18/7/1977.

(d) The reinstated matter was taken up by CIT (Appeals) who had derived jurisdiction by then. The CIT (Appeals) held by his order dated 29/2/1980 that Section 41(2) of the Act was applicable and the correct profit taxable under the said section would be Rs.5,66,177/- and not Rs.10,25,135/-.

(e) The assessee challenged the said order by way of appeal before the Tribunal and the Revenue Preferred cross objections challenging the reduction of taxable profit under section 41(2) of the Act.

(f) The Tribunal vide its order dated 16/7/1981

restored the matter back to the Income Tax Officer to consider the claim of the assessee that the transfer was of the whole business and not of any individual assets in light of the judgment of this High Court in the case of *Artex Manufacturing Co. Vs. CIT (1981) 131 ITR 559 (Guj.).* The cross objections of the department were dismissed as being barred by limitation.

(g) Once again the Assessing Officer treated a sum of Rs.10,25,135/- as profit liable to tax under section 41(2) of the Act by framing a best judgment assessment under section 144 of the Act.

(h) The assessee sought rectification of the said assessment by application under section 154 of the Act, as a result of which by order dated 6/4/1984 the addition was reduced to Rs.5,66,177/-.

(i) The assessee had also filed application under

section 146 of the Act which came to be allowed vide order dated 16/4/1984.

(j) The Income Tax Officer again passed a fresh assessment order on 23/3/1987 computing profit chargeable under section 41(2) of the Act at Rs.10,25,135/-. He negatived the contention raised by the assessee by holding that there was no transfer of the going concern and the assessee's case was not covered by the ratio of the decision of this Court in the case of *Artex Manufacturing Company* (supra). In the assessment order , alternatively it was held that as the judgment of this High Court had not been accepted by the department and the matter was pending before the Supreme Court the issue had to be kept alive.

(k) The assessee went in appeal before CIT (Appeals) who for the reasons stated in his order dated 23/3/1988 held that the assessee

firm had entered into a slump sale whereby the entire business was sold to the limited company as going concern and therefore , the assessee was not liable to be taxed under section 41(2) of the Act.

(l) The revenue carried the matter in appeal before the Tribunal. The Tribunal for the reasons stated in his order dated 6/1/1992 came to the conclusion that the CIT (Appeals) had rightly read the documents in question and the assessee was not liable to be taxed under section 41(2) of the Act. However, the Tribunal restored the matter back to CIT (Appeals) to determine whether the assessee was liable to be charged under the head 'Capital Gains'. It is this order which is under challenge in the present proceedings.

4 Mr.Tanvish U.Bhatt, learned Standing Counsel appearing on behalf of the applicant revenue

assailed the order of the Tribunal primarily on the ground that the Assessing Officer had taken the details which are available on record to compute the balancing charge under section 41(2) of the Act and the Tribunal had wrongly read the agreements between the assessee firm and the limited company to hold that there was transfer of the entire business as a going concern. Alternatively, relying on the decision of Apex Court in the case of *CIT Vs. Artex Manufacturing Company (1997) 227 ITR 260* it was contended that even if the transaction was regarded as slump sale on the basis of information that was available with the Assessing Officer the assessee had rightly been held to be taxable under section 41(2) of the Act. He also cited decision of this Court rendered in the case of *CIT vs. Shahibaug Entrepreneurs Pvt.Ltd. (2001) 251 ITR 433* to submit that even this Court had read and applied the decision of the Apex Court in case of Artex Manufacturing Company

(supra) in the manner revenue was contending. He therefore urged that the Tribunal's order was required to be set aside and the order of Assessing Officer restored.

5 Mr.J.P.Shah, learned Advocate appearing on behalf of the respondent assessee submitted that there was no error in the impugned order of the Tribunal and there was no dispute as to the legal proposition, but the findings of fact recorded by the Tribunal were such that no interference was called for. The Tribunal had applied the settled legal position to the facts found.

6 As can be seen from the record the Tribunal has confirmed the order of CIT (Appeals)and deleted the addition made under section 41(2) of the Act by holding that what the assessee firm had sold was the whole business as a going concern. The Tribunal has agreed with the findings given by CIT (Appeals) that when all the agreements are read together

what emerges is that what was sold by the assessee firm to the limited company was the running business as a going concern together with all the assets and liabilities and hence applying ratio of the decision of the jurisdictional High Court and the Apex Court provisions of Section 41(2) of the Act cannot be invoked. CIT (Appeals) has referred to agreement dated 1/12/1971 and after reproducing various clauses of the said agreement together with agreements dated 1/1/1972 and 17/8/1973 come to the conclusion that it was beyond pale of doubt that the transfer was of the entire business if various terms of the agreements are borne in mind.

7 The Assessing Officer by relying on the deed of assignment executed on 17/8/1973 has worked out the surplus liable to tax under section 41(2) of the Act by adopting following figures. The Tribunal has extracted the said portion in paragraph 2 of its order.

"In this deed, it was inter-alia mentioned that value of all the assets taken over by the company was determined at Rs.77,37,579/- comprising of the following items :

a)	Rs.3,76,000	Value of building structure at Bella Mill Compound.
b)	Rs. 45,837	Being value of goodwill of the firm.
c)	Rs.44,80,984	Being the value of plant & machinery and equipment of Rampura Unit and of Bell Mill Compound Units, furniture and the value of stock-in-trade.
(d)	Rs.28,34,758	Aggregate value of loss, advance, cash, bank balance,investment etc.

Total : Rs.77,37,579

Less :

Liabilities Taken over	Rs.62,22,579
	Rs.15,15,000 "

8 On going through the aforesaid figures it is

apparent that the Assessing Officer had adopted the aggregate values of the building structure as well as plant and machineries, furniture and stock in trade. On a plain reading of Section 41(2) of the Act it becomes clear that for the purpose of invoking the said section it is necessary that each individual asset, be it a building or plant or machinery, has to be (a) owned by the assessee, (b) used for the purpose of business of the assessee, (c) should have written down value and actual cost, and (d) there should be excess which does not exceed the difference between the actual cost and the written down value which shall be chargeable to tax as income of the business of the previous year in which monies payable for such building, machinery, plant or furniture became due. Therefore, for each asset which is sold the Assessing Officer must have with him the actual cost, WDV and the sale consideration. In absence of the same, Section 41(2) of the Act cannot be applied. In a case like the present one where the entire business is sold as a going concern with all assets and liabilities it is apparent that the provision cannot be invoked unless and until the aforesaid information is available with the Assessing Authority. It is in this context that the

ratio of the Apex Court's decision in case of *CIT Vs. Artex Manufacturing Company (supra)* has to be appreciated and applied when it is observed that provision of Section 41(2) of the Act can be applied on the basis of the information that may be available with the Assessing Officer.

9 As already noticed hereinbefore, in the present case both the Commissioner (Appeals) and the Tribunal have concurrently found after appreciating evidence on record (in the form of various agreements) and on facts that the transaction was a slump sale i.e., the entire business undertaking was sold as a going concern and there was no itemised sale. Even the Assessing Authority has not been able to workout the itemised sale qua each building, machinery or plant as the case may be. Therefore, in absence of any evidence on record to dislodge the findings of fact recorded by the Commissioner (Appeals) and the Tribunal, it is not possible to find any infirmity in the impugned

order of Tribunal so as to hold that provisions of Section 41(2) of the Act are applicable to the facts of the present case.

10 Before parting it is necessary to take note of the fact that Supreme Court itself has in similar fact situation in the case of *CIT vs. Electric Control Gear Mfg. Co. (1997) 227 ITR 278* distinguished its own decision in Artex Manufacturing Company by holding that there was nothing to indicate that the price attributable to the assets like machinery, plant or building out of the total consideration amount and merely because depreciation had been allowed, it could not be said that the balance was the excess amount between the price and the written down value.

11 The Tribunal was therefore right in law and facts in holding that what was sold by the assessee firm to the limited company was its running business as a going concern together with all the assets and liabilities and the provision of section 41(2) of the Act cannot be invoked on the facts and circumstances of the case. The question referred to is therefore answered in the affirmative i.e., in

favour of the assessee and against revenue.

12 The reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani,J)

m.m.bhatt